

Foreign and Domestic Car Service, Inc. and Automobile Transport Chauffeurs, Demonstrators and Helpers, Local Union No. 604, affiliated with the International Brotherhood of Teamsters, AFL-CIO, CLC. Case 14-RC-12171

January 31, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND HURTGEN

On May 10, 2000, the Petitioner filed a petition seeking to represent all rail loaders, unloaders, and scanners employed by Foreign and Domestic Car Service, Inc. (FDCS), at Norfolk Southern Corporation's (NSC) Venice, Illinois facility. FDCS asserts that it provides rail loading services to NSC, a common carrier subject to the jurisdiction of the Railway Labor Act (RLA), that the services it provides are those traditionally done by railroad employees, that NSC exercises substantial control over FDCS, and accordingly, that the National Labor Relations Board (the Board) lacks jurisdiction under Section 2(2) of the National Labor Relations Act (the Act). After a hearing, the Regional Director transferred the proceeding to the Board.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in this case, the Board finds:

NSC contracts with FDCS for its services in loading and unloading new automobiles to and from NSC rail cars. New vehicles are delivered to the NSC Venice site by independently owned semi-tractor auto carriers where they are off loaded by the auto carrier drivers. FDCS employees then inspect the vehicles and enter the vehicle identification number by means of a scanner. This information is then transmitted to NSC where it is utilized to designate the vehicles to be loaded on auto carrier railroad cars by FDCS employees. All of the offices and equipment used by FDCS are owned by NSC, and FDCS pays no rental fees for their use. The employees of FDCS and NSC share lockers and toilet facilities. There are seven employees in the proposed unit. Because NSC is FDCS's only customer, the unit employees work only under the NSC contract.

The uncontroverted evidence reveals that NSC exercises extensive control over the operations of the Employer. Background checks for prospective FDCS employees are required and conducted by NSC. NSC reserves the right to prohibit FDCS employees from its premises, in which case FDCS terminates such employ-

ees. The record indicates that NSC has exercised this right and has done so without notifying FDCS as to the reason. FDCS employees are required by NSC to wear uniforms that are designed by NSC in order to avoid having any buttons or zippers that might scratch a car. NSC trains FDCS employees.

Except for a policy against sexual harassment, FDCS has no employee work rules or policies of its own. Instead, FDCS employees are required to follow NSC's operations manual (*Manual for Loading & Unloading Autos on Railcars*), which describes every step in the loading and unloading of new vehicles on and off NSC rail cars by FDCS employees. The failure of an FDCS employee to comply with an NSC policy, resulting in damage to a vehicle, can result in discipline of the employee; NSC advises FDCS what discipline to impose on the FDCS employee where there has been a "significant violation." NSC managers generally direct FDCS supervisors on what FDCS employees should do. Additionally, NSC supervisors have the right to directly instruct FDCS employees in the performance of specific tasks. The wages and benefits of unit employees are set by FDCS without any NSC involvement.

Section 2(2) of the National Labor Relations Act provides that the term "employer" shall not include "any person subject to the Railway Labor Act." 29 U.S.C. § 152(2). Similarly, Section 2(3) of the Act provides that the term "employee" does not include "any individual employed by an employer subject to the Railway Labor Act." 29 U.S.C. § 153(3). The RLA, as amended, applies to rail carriers.

On September 21, 2000, the Board requested that the NMB study the record in this case and determine the applicability of the RLA to the FDCS. The NMB subsequently issued an opinion indicating that the loading and unloading work in question here is work traditionally done by carriers and that NSC, a carrier, exercises "substantial control" over FDCS and its employees. In its view, FDCS is subject to the RLA. *Foreign & Domestic Car Service*, 28 NMB 82 (2000), citing, inter alia, *Bankhead Enterprises*, 17 NMB 153 (1990).²

¹ The only issue presented at the hearing involved the jurisdiction of the Board over FDCS.

² The NMB uses a two-pronged jurisdictional analysis where the company is a separate corporate entity and does not fly aircraft for the public transportation of freight or passengers. Under the first prong of the test, known as the "ownership or control" prong and derived from the language of the Railway Labor Act, the NMB determines whether a common carrier exercises direct or indirect ownership or control of the entity. Thus, 45 U.S.C. § 151 First and 181 states that "the term 'carrier' includes . . . any company which is directly or indirectly owned or controlled by or under common control with any carrier." *Delpro Co. v. Railway Carmen*, 519 F.Supp. 842, 848 at fn. 14 (D.C. Del. 1981), aff'd. 676 F.2d 967 (3d Cir. 1982), cert. denied 459 U.S. 989 (1982). See also *Ground Services*, 7 NMB 509, 510 (1980). The second prong of the test, known as the "function" prong, is also derived from 45

U.S.C. § 151 First. For the NMB's jurisdiction to attach to the noncarrier under the carrier's control, the RLA states that the entity must be one "which operates any equipment or facilities or performs any service . . . in connection with the transportation, receipt, delivery . . . transfer in transit . . . and handling of property transported . . ." *Delpro Co.*, supra., 676 F.2d at 964. In this part of the test, the NMB determines whether the work is traditionally performed by employees of air or rail carriers. The NMB requires that both prongs of the test must be met in order for it to assert jurisdiction under the RLA. *United Parcel Service*, 318 NLRB 778, 779–780 fn. 7 (1995), enfd. 92 F.3d 122 (D.C. Cir. 1996). In its opinion, the NMB concluded that both prongs of the test had been met.

Having considered the facts set forth here in light of the opinion issued by the NMB, we find that Foreign and Domestic Car Service, Inc. is engaged in interstate common carriage so as to bring it within the jurisdiction of the NMB pursuant to Section 201 of Title II of the RLA. Accordingly, we shall dismiss the petition.

ORDER

It is ordered that the petition in Case 14–RC–12171 is dismissed.